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Indirect Tax Alert

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Ruling under GST era

Rajesh Rama Varma - Authority for Advance Ruling, Tamil Nadu[1]

Issue for Consideration

Can IT software related consultancy services provided to the foreign client of another company be regarded as an export of service?

Discussion

- The Applicant is engaged in the business of providing IT software related consultancy services in relation to Oracle ERP w.r.t Oracle Financials. These services broadly include implementation, enhancement, support services and other services which are covered under SAC 998313.
- The Applicant had entered into a contract with M/s Doyen Systems Private Limited ("Doyen") to provide the said services to a foreign client ("the Foreign client") of Doyen. The original contract was between Doyen and the Foreign client and a part of such services was contracted by Doyen with the Applicant.
- As per the contractual obligation between the Applicant and Doyen, the Applicant needs to provide support services directly to the Foreign client from the office premises of Doyen. The consideration was fixed in USD/per hour and would be paid based on the number of hours worked basis the timesheet submitted to Doyen. The consideration would be paid by Doyen based on the INR equivalent conversion rate.
- Doyen raises a consolidated monthly invoice in USD on the Foreign client basis the timesheets provided by the various employees working on the project. At the end of the month, the finance department of Doyen provides USD billing with an equivalent INR value to the Applicant based on which the Applicant raises an invoice on Doyen in INR value with 18% GST (CGST and SGST).
- Doyen treats these services as export of service and accordingly, claims the benefit of export of service under the GST law.
- The Applicant approached the Authority for Advance Ruling ("the Authority") to contend that the services provided by them to the Foreign client are

[1] Ruling no. 20/ARA/2020 dated April 24, 2020

export of services on the basis of the following grounds:

- The services are provided directly to the Foreign client on behalf of the Principal. By referring to the definitions of 'agent', 'supplier' and 'principal' under the GST law, the Applicant is an 'agent' rendering services to the Foreign client representing Doyen.
- The definition of 'supplier' also includes an 'agent'. Thus, the conditions prescribed under the definition of 'export of services' in relation to the location of the supplier and recipient and the place of supply stand fulfilled.
- Under the Foreign Exchange Management Act, 1999, it is provided that if the payment in Indian rupees is received in India through a banking channel it is deemed to have been received in convertible foreign exchange. In the present case, the payment has been received from the Foreign client in USD into the bank account of Doyen which in turn is remitted to the Applicant in INR. Reliance was placed upon various Tribunal rulings pronounced in the erstwhile Service tax regime, where inward remittance of export proceeds in INR was treated as receipt of payment in convertible foreign exchange. Accordingly, the condition of receipt in convertible foreign exchange also stands fulfilled to qualify as 'export of service'.

- The Authority observed that the questions raised by the Applicant do not fall under section 97(2) of the CGST Act, 2017 and therefore, the question was modified to ask whether GST is liable to be paid on the services rendered to the Foreign client. Accordingly, the Authority observed as follows:
  - In the present case, there are two sets of contracts. First between the Foreign client and Doyen and second between Doyen and the Applicant. The Applicant is neither a party to the first contract nor privy to it. There is no contract between the Applicant and the Foreign client. Even the timesheets provided by the Applicant are not forwarded directly to the Foreign client for their approval but are submitted to Doyen who then verifies the claim for genuineness with the Foreign client. The invoices are raised by the Applicant on Doyen with the description mentioned as support services provided to the Foreign client.
  - The consideration is paid by the Foreign client to Doyen as per the independently agreed contract value which has no relevance or reference to the contract that the Applicant has entered into with Doyen. Thus, the Foreign client is not obliged to make any payment as consideration to the Applicant. In the case of default in payment of consideration, a claim by the Applicant can be made against Doyen and not against the Foreign client. Hence, Doyen qualifies as a recipient of service in terms of section 2(93)(a) of the CGST Act, 2017.
  - There is also no mention anywhere in the consultancy agreement that the Applicant has to provide services to the Foreign client. Merely because, the Applicant is mentioned in the email correspondence with the employees of the Foreign client does not mean that he is carrying on the business of supply of services on behalf of Doyen, in terms of definition of 'agent' under section 2(5) of the CGST Act, 2017. There is no documentary proof that the Applicant is the representative of Doyen, while dealing with the Foreign client. Accordingly, the services are being provided to Doyen and not to their Foreign client directly or indirectly.
  - The services provided by the Applicant to Doyen qualifies as a 'supply' in terms of section 7 of the CGST Act, 2017 read with clause 5(d) of Schedule II of the CGST Act, 2017.

Ruling

The services are being supplied by the Applicant to Doyen and not to the Foreign client. Further, the said services are liable to GST.

Dhruva Comments:

The case deals with a standard sub-contracting arrangement and the recipient of such services would be the main contractor, even though the services are directly received by the ultimate customer. Few other

aspects like privity of contract, person liable to pay consideration, enforceability of contract etc. should be taken into consideration for decoding the transaction. The Authority has correctly held that recipient of service is Doyen and not the Foreign client as the contract for provision of service is between the Applicant and the Doyen.

In a similar ruling in the case of *Ansys Software Pvt Ltd.*[2], the Applicant had provided post sales technical support service to the Indian customers of its Foreign Parent Company. The consideration was paid by the foreign company for such a service. The Authority had held that the foreign company would be regarded as a recipient of service in terms of section 2(93) of the CGST Act, 2017 as the consideration was received from the parent company.

Judgment under GST era

M/s. L & T Hydrocarbon Engineering Limited v. The State of Karnataka and Ors.[3]

Issue for Consideration

Can a Writ Petition be filed before the High Court when a remedy for filing an appeal before the Appellate Authority is available under section 107 of the CGST Act, 2017?

Discussion

- The Petitioner is engaged in the business of procurement, fabrication, construction, project management and integrated design to build solutions for onshore and offshore hydrocarbon projects.
- The Petitioner had transported 229.94 MTs of goods from its SEZ unit in Tamil Nadu to its bonded warehouse in Gujarat. The movement of goods was supported by all the relevant documents such as delivery challan, E-way bill, tax invoice, bill of entry, etc.
- One of the conveyances was intercepted and inspected by the department. Upon physical verification of the goods, it was found that the quantity carried in the conveyance was 41 MT, however the declaration was made only for 31 MT. Hence, the department detained the goods and conveyance on May 22, 2020, under section 129 of CGST Act, 2017.
- The Petitioner vide its letter dated May 22, 2020 explained that the discrepancy had occurred due to a clerical error of interchange of weighment and quantity between two conveyances. However, the department had issued a notice dated May 23, 2020 proposing to demand tax and penalty under section 129(1)(a) and (b) of the CGST Act, 2017.
- The Petitioner filed its reply to the notice and stated that it was an erroneous representation of 31 MT instead 41 MT. Further, reliance was placed upon circular no. 64/38/2018-GST dated September 14, 2018 to contend that the maximum penalty of ₹500 could only be levied under section 125 of the CGST Act, 2017. However, the department passed an order dated June 4, 2020 confirming the demand.
- Accordingly, the Petitioner has filed the present Writ Petition against the order of the department. The Petitioner contended as follows:
  - The transaction, being a bond-to-bond movement, is considered an import by bonded warehouse and is not liable to GST. Since the transaction is not liable to GST, the penalty imposed under section 129 of the CGST Act, 2017 is not sustainable.
  - Penalty cannot be levied when a discrepancy arises due to clerical and typographical errors.
  - Basis the circumstances, the payment as ordered should have been rectified suo moto at the earliest but the same was not acted upon.
- The department contended as follows:
  - Petitioner should file an appeal against the order, under section 107 of the CGST Act, 2017 before the Appellate Authority. Petitioner cannot be in a hurry and invoke writ remedy under Article 226 of the Constitution of India.

[2] 2019 (30) GSTL 563 (AAR-GST)
[3] 2020-VIL-275-KAR

- The fact of error though brought to the notice of department was not agreed upon and consequently, the error shall not be treated as clerical in nature.

- The Hon'ble High Court, after taking into account the provisions of section 106, 107 and 108 of the CGST Act, 2017, observed as follows:
  - An error may contain wrong representation of facts or statistics or statements without any intention to do so but due to honest oversight. However, in cases where such error is brought to notice of the department and the error is not accepted as erroneous, it cannot be said that there was a slip or oversight.
  - As per section 107 of the CGST Act, 2017, a remedy has been provided to appeal against the order before the Appellate Authority. Accordingly, the writ remedy cannot be invoked by making the High Court as middle authority or the High Court cannot be placed in between the department and the Appellate Authority.
  - The law has prescribed for efficacious remedy to the Petitioner in the present circumstances.
  - The matter does not stand in the footing of error or oversight or a slip.

Judgment

The Petitioner should appeal before the Appellate Authority as per the law and the Writ Petition is dismissed.

Dhruva Comments:

Although the powers conferred under Article 226 are wide, the writ remedy cannot be exercised to make the High Court as an intervening authority when an alternate remedy is available.

The Gujarat High Court in the case of *Shiv Agro Through Ashokkumar Kantibhai Patel* v. *State of Gujarat*[4] has also passed a similar judgment directing the assessee to seek an appeal before the Appellate Authority under section 107 of the CGST Act, 2017.

[4] 2020 (5) TMI 309 - Gujarat High Court

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